

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

DESERT BRANCH (INDIO)

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

SEP 09 2019

by *C. Delgadillo* C. Delgadillo
Deputy

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THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

v.

ELIJAH TIREK HALL,
ANTHONY JASON TORRES, ET AL.,

Defendants.

Case no. INF1500253

**COURT'S ORDER
TRANSFERRING DEFENDANTS
ELIJAH HALL AND ANTHONY
TORRES TO JUVENILE
JUSTICE COURT FOR A
DISPOSITIONAL HEARING**
(Welf. & Inst. Code, §§ 602,
707, 725-726, et seq.)

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

v.

ANTHONY JASON TORRES,

Defendant.

Case no. INF1500502

**COURT'S ORDER
TRANSFERRING DEFENDANT
ANTHONY TORRES TO
JUVENILE JUSTICE COURT
FOR A DISPOSITIONAL
HEARING**
(Welf. & Inst. Code, §§ 602,
707, 725-726, et seq.)

I. Introduction.

On April 30, 2019, the First District Court of Appeal held that Senate Bill 1391 ("SB 1391"), which effective January 1, 2019, increased the minimum age for adult prosecution to 16, is constitutional. (*People v. Superior Court (Alexander C.)* (2019) 34 Cal.App.5th 994, 246 Cal.Rptr.3d 712.) On June 19, 2019, the Third District Court of Appeal reached the same conclusion. (*People v. Superior Court (K.L., et al.)* (2019) 36 Cal.App.5th 529, 248 Cal.Rptr.3d 555.) On August 5, 2019, the Fifth District Court of Appeal issued two

decisions in companion cases, and in 2-1 votes the court found SB 1391 constitutional.¹ (*People v. Superior Court (T.D.)* (2019) 38 Cal.App.5th 360, 250 Cal.Rptr.3d 661; *People v. Superior Court (I.R.)* (2019) 38 Cal.App.5th 383, 2019 WL 3543618.²) The decisions of all three districts are in direct conflict with this Court's January 7, 2019, ruling to the contrary. This Court being inferior to the Courts of Appeal, the decisions in *Alexander C., K.L., T.D.*, and *I.R.* are binding and controlling herein.

The decisions in *Alexander C., K.L., T.D.*, and *I.R.* have not caused this Court (hereinafter "the Court") to change its views. But in light of three appellate districts having now upheld SB 1391, the Court believes it to be unjust for defendants Elijah Hall and Anthony Torres to be housed in state prison pending resolution of their direct appeals.³ For one, unless and until another appellate court, including the Supreme Court, reaches a contrary conclusion, *Alexander C., K.L., T.D.*, and *I.R.* constitute the law of this State. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455-456, 20 Cal.Rptr. 321, 369 P.2d 937; *In re Javier A.* (1984) 159 Cal.App.3d 913, 954-956, 206 Cal.Rptr. 386.) Two, in accord with the status quo, i.e. SB 1391 is constitutional, the defendants should not be treated differently from others whose cases have since been transferred to juvenile justice court. The Court has therefore exercised its discretion, pursuant to Penal Code section 1170, subdivision (d)(1), to recall sentence in this matter.⁴

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¹ On June 26, 2019, the Supreme Court summarily denied a petition for review filed by the District Attorney of Solano County in the *Alexander C.* case. (Cal. S.Ct. case no. S255985.) On July 17, 2019, the Supreme Court summarily denied a petition for review filed by the District Attorney of Sacramento County in the *K.L.* case. (Cal. S.Ct. case no. S256637.) On September 3, 2019, the Court of Appeal denied a petition for rehearing in the *T.D.* case.

² As of the date of this order, the California Reporter has not yet published the *I.R.* decision, and page numbers are not yet available under the official citation, 38 Cal.App.5th 383.

³ Defendants Hall and Torres were 15- and 14-years-old respectively at the time of their commitment offenses. They were convicted by a jury in June of 2018 but were not sentenced until March of 2019.

⁴ See *People v. Espinosa* (2014) 229 Cal.App.4th 1487, 1496, 177 Cal.Rptr.3d 887, "[W]ithin the 120-day period, the court may recall a sentence on its own motion for any reason rationally related to lawful sentencing. [citations.]"

II. Court's order transferring the defendants to juvenile justice court for a dispositional hearing.

On May 1, 2019, in light of the decision in *Alexander C.*, the Court issued an order to show cause why sentence should not be recalled. Only the People responded with written points and authorities. On June 3, 2019, the Court issued an order formally recalling sentence and setting the matter for hearing. On June 5, 2019, a removal order was filed directing that defendants Hall and Torres be transferred from state prison to county jail for re-sentencing. On August 26, 2019, the defendants appeared before the Court represented by counsel. All sides were given an opportunity to be heard. The Court will now rule.

THE COURT HEREBY ORDERS that defendants Elijah Hall and Anthony Torres be transferred to the juvenile justice court for a dispositional hearing. (Welf. & Inst. Code, §§ 602, 725-726, et seq.) Their convictions shall be deemed true findings in a sustained juvenile petition. (*People v. Superior Court (Lara)* 4 Cal.5th 299, 310, 228 Cal.Rptr.3d 394, 410 P.3d 22.) The juvenile justice court shall then decide an appropriate disposition. Thereafter, all parties will retain the right to appeal the final judgment including the Court's transfer of the case to juvenile justice court and the Court's ruling on SB 1391's constitutionality.⁵

However, before leaving this case for good, the Court will comment on subsequent developments in the law since the defendants were first sentenced in March of 2019.

III. Proposition 57, SB 1391, *People v. Superior Court (Alexander C.)*, *People v. Superior Court (K.L. et al.)*, *People v. Superior Court (T.D.)*, and *People v. Superior Court (I.R.)*.

The Court's views regarding SB 1391 were set forth in its January 7, 2019, statement of decision declaring the bill unconstitutional. As previously stated, those views remain unchanged. Having now reviewed the decisions in *Alexander C.*, *K.L.*, *T.D.*, and *I.R.*, the

⁵ The Court notes that the Attorney General defended the constitutionality of SB 1391 in *Alexander C.*, *K.L.*, *T.D.*, and *I.R.* The District Attorneys of Solano and Sacramento Counties prosecuted the writ petitions at issue in *Alexander C.* and *K.L.* The District Attorneys of Stanislaus and Kings Counties prosecuted the writ petitions at issue in *T.D.* and *I.R.* The District Attorney of Santa Clara County argued against SB 1391's constitutionality in *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009, 1038-1039, 241 Cal.Rptr.3d 241, but the Sixth District Court of Appeal ultimately declined to address the issue. Finally, the District Attorney for the County of Riverside, the attorney for the plaintiff in this matter, has also taken the position that SB 1391 is unconstitutional.

Court will address several points discussed therein as well as others unmentioned. While the Court is bound by published appellate precedent, it is not gagged by it. (*Auto Equity Sales, supra*, 57 Cal.2d at pp. 455-456; *Javier A., supra*, 159 Cal.App.3d at pp. 956-975; *People v. Hart* (1999) 74 Cal.App.4th 479, 487, 86 Cal.Rptr.2d 862, citing 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 931, p. 967.)

In *Alexander C. and K.L.*, the Courts of Appeal held that SB 1391 is constitutional because it furthers the ameliorating principles of the initiative it amends, Proposition 57. (Cal. Const., art. II, § 10, subd. (c); *Alexander C., supra*, 34 Cal.App.5th at pp. 997, 1001-1002, 1004-1005; *K.L., supra*, 36 Cal.App.5th at pp. 532, 538-541.) For example, the *K.L.* court noted that:

“Taken as a whole, and in the context of juvenile offenders, it appears the intent of Proposition 57 was to reduce the number of youths who would be prosecuted as adults.

... SB 1391 furthers the stated purpose and intent of Proposition 57 to have fewer youths removed [to adult court⁶] from the juvenile justice system [and is therefore constitutional.]”

(*K.L., supra*, 36 Cal.App.5th at p. 541.⁷) *Alexander C.* reached the same conclusion. It held that SB 1391 furthers Proposition 57’s goals of both reducing costs of incarceration and promoting compliance with a federal court order to reduce prison overcrowding. (*Alexander C., supra*, 34 Cal.App.5th at pp. 1001-1002.) The *Alexander C.* court therefore declared the bill constitutional. (*Id.* at p. 1005.)

⁶ Like the Court’s previous statement of decision, for ease of reference this order will refer to juvenile justice prosecutions as taking place in “juvenile court,” and adult criminal prosecutions (including of juveniles) as taking place in “adult court.” Also, the Court will use the terms “juvenile,” “minor,” and “youth” synonymously throughout this order.

⁷ On August 26, 2019, in an unrelated case, the Third District Court of Appeal referred back to its holding in *K.L.* Distinguishing the statute at issue from SB 1391, the Court emphasized that “Senate Bill No. 1391 furthered the purpose of Proposition 57 by replacing [a] restriction with a prohibition.” (*Howard Jarvis Taxpayers Assn. v. Newsom* (2019) 2019 WL 4013448, Court of Appeal case no. C086334.) The Third District has thus reaffirmed its view that SB1391 was permissible amendatory legislation.

In the Court's respectful view, both decisions (*Alexander C.* in particular) devoted insufficient analysis and discussion to decades of cases analyzing legislative amendments of voter-approved initiatives with heightened scrutiny. Indeed, the only case cited in *Alexander C.* on the issue of legislative amendments to voter-approved initiatives, *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 48 Cal.Rptr.2d 12, 906 P.2d 1112, held that legislation exempting surety insurers from Proposition 103's consumer protections was unconstitutional. (*Amwest, supra*, 11 Cal.4th at pp. 1263-1265.) Several other published decisions have reached similar conclusions, but none were cited or distinguished in *Alexander C.*⁸

T.D. on the other hand is a rather thoroughly written opinion that addresses virtually all arguments for and against SB 1391's validity.⁹ In analyzing the text of Proposition 57, the *T.D.* court noted the following:

“The language of Proposition 57 permitting only amendments that “are consistent with and further the intent of this act” ... is, for want of punctuation, patently ambiguous. It can be read to allow amendments that are consistent

⁸ The Court of Appeal in *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1243, 76 Cal.Rptr.2d 342, declared unconstitutional a legislative amendment reducing an insurer's rollback obligations in the wake of Proposition 103's implementation. The Court of Appeal in *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 34 Cal.Rptr.3d 354, declared unconstitutional a legislative amendment that allowed insurers to take into account an insured's prior history of coverage as a basis for discounted premiums. The Supreme Court in *Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, 101 Cal.Rptr.3d 229, declared unconstitutional a legislative amendment to Proposition 36 allowing for “flash incarceration.” The Supreme Court in *People v. Kelly* (2010) 47 Cal.4th 1008, 103 Cal.Rptr.3d 733, declared unconstitutional legislation setting forth presumptive limits for cannabis possession in the wake of Proposition 215. Finally, the Court of Appeal in *Howard Jarvis Taxpayers Assn. v. Bowen* (2011) 192 Cal.App.4th 110, 124, 120 Cal.Rptr.3d 865, declared unconstitutional legislative action that merely “in effect” amended Proposition 9, namely the Legislature as opposed to the Attorney General designating an initiative's title and placement in ballot materials.

This is not an exhaustive list of cases declaring legislative amendments of voter-approved initiatives unconstitutional. For a more thorough discussion of these cases and others, reference may be made to the Court's January 7, 2019, statement of decision.

⁹ *I.R.* did not readdress or further expand upon the holding in *T.D.* that SB 1391 is a valid amendment to Proposition 57. Instead, *I.R.* held that SB 1391 is retroactive, is not unconstitutionally vague, and does not invalidly amend Proposition 21. (*I.R., supra*, 2019 WL 3543618 at pp. 3-5.) Further, *I.R.* held that the fact that the minor in that case was alleged to have committed a Welfare & Institutions Code section 707(b) offense after turning 16 did not mean a murder he allegedly committed at age 15 was now eligible for adult prosecution. (*Id.* at pp. 5-6.)

with the express language of the Act and that further the intent of the Act; or, it can be read to allow amendments that are consistent with the intent of the Act and that further the intent of the Act.”

[quotations in original, internal citation omitted.] (*T.D.*, *supra*, 250 Cal.Rptr.3d at p. 669.)

Continuing, the *T.D.* court noted:

“If the amendatory language is interpreted in the first manner, [SB 1391] unconstitutionally amends the Act, because its removal of 14- and 15-year-olds from the possibility of prosecution in adult court is inconsistent with the express language of the Act.”

(*Ibid.*) Nevertheless, *T.D.* rejected this interpretation of Proposition 57 as in the court’s view, such an interpretation “would appear to preclude *any* amendment that deletes or repeals any portion of the Act, no matter how consistent such action might be with the purpose of the Act itself.” [italics in original.] (*Ibid.*) In language and reasoning similar to *Alexander C. and K.L.*, the *T.D.* court held that SB 1391 is constitutional. (*T.D.*, *supra*, 250 Cal.Rptr.3d at pp. 666-674.)

Turning back to *Alexander C. and K.L.*, the Court notes that both opinions sidestepped the question whether Proposition 57 permits the Legislature, by simple majority vote,¹⁰ to eliminate adult court jurisdiction over juveniles altogether. *T.D.* on the other hand did address the issue though not in substantial detail. The *T.D.* court acknowledged that “where uncertainty [in statutory interpretation] exists[,] consideration should be given to the consequences that *will flow* from a particular interpretation.” [quotations and italics in original.] (*T.D.*, *supra*, 250 Cal.Rptr.3d at p. 673, quoting *People v. Valencia* (2017) 3 Cal.5th 347, 358, 220 Cal.Rptr.3d 230, 397 P.3d 936.) The *T.D.* court however opted to confine its discussion to analyzing consequences flowing directly from SB 1391, i.e. its raising the minimum age for adult prosecution to 16, a consequence which it believed

¹⁰ SB 1391 did not pass both houses of the Legislature by the two-thirds majority (previously) required by Proposition 21. (See § 39, Prop. 21; See also https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill_id=201720180SB1391.)

furthered Proposition 57. (*Ibid.*) The *T.D.* court thus declined to “join the District Attorney in speculating as to what the Legislature might do in the future.” (*Ibid.*)

The Court however continues to believe that the issue is a critical one for analysis. After all, SB 1391 took the juvenile justice system halfway to the point of eliminating adult jurisdiction over minors altogether. Thus unlike *T.D.*, the Court here will analyze consequences that may *ultimately* flow from SB 1391, particularly now at a time when we may simply be waiting for the other shoe (minors 16-17) to drop. It should be noted that in *T.D.*, the Attorney General at oral argument apparently conceded that if SB 1391 is constitutional, eliminating adult jurisdiction over all minors may be valid as well. (*T.D.*, *supra*, 250 Cal.Rptr.3d at p. 676, fn. 2 (POOCHIGIAN, J., dissenting).)

Therefore, at the risk of some repetition, the Court respectfully sets forth the following.¹¹

A. Proposition 57’s reforms to the adult and juvenile criminal justice systems.

Proposition 57, the stated foundation for SB 1391, accomplished at least two significant changes to criminal justice in California. It broadly expanded parole opportunities for adult offenders, and it eliminated the direct filing procedure Proposition 21 had provided to prosecutors. (§§ 3, 4.2, Prop. 57.) First, the Court will discuss changes made applicable to adult offenders.

Proposition 57 amended the California Constitution to provide that adult offenders sentenced to state prison for nonviolent felony offenses shall be eligible for parole after completing the full term for their primary commitment offense, disregarding subordinate terms, enhancements, and alternate penalty provisions. (Cal. Const., art. I, § 32, subd. (a)(1); Pen. Code, §§ 1170, 1170.1, et seq.) Proposition 57 did not define “nonviolent felony offense[s]” thereby resulting in confusion. While the better practice would have certainly been to have provided a definition of “nonviolent felony,” the term “*violent* felony” at least

¹¹ What follows is written under the assumption that the reader is familiar with the Court’s written decision of January 7, 2019. .

has long been defined by the Penal Code. [italics added.] (*Ibid*; Pen. Code, § 667.5, subd. (c).)

Specifically, Penal Code section 667.5, subdivision (c), has for over four decades provided a list of offenses deemed “violent felon[ies]” under California law.¹² It is therefore not a leap of faith to conclude that “nonviolent,” as used in Proposition 57, means *not* violent, i.e. not a crime listed in Penal Code section 667.5(c).¹³ This interpretation has been adopted by the Courts of Appeal as well as the Department of Corrections and Rehabilitation. (*In re Edwards* (2018) 26 Cal.App.5th 1181, 1192-1193, 237 Cal.Rptr.3d 673; *In re Gadlin* (2019) 31 Cal.App.5th 784, 787-789, 243 Cal.Rptr.3d 331; *In re Arroyo* (2019) 37 Cal.App.5th 727, 250 Cal.Rptr.3d 520; Cal. Code of Regs., tit. 15, § 3490, subd. (c).) Consistent with the stated goal of avoiding “the release of prisoners by federal court order,” this interpretation has resulted in significantly earlier parole eligibility dates for inmates convicted of serious but not violent felonies, including some serving “third strike” sentences. (§§ 2-3, Prop. 57; Pen. Code, §§ 667, subds. (b)-(i), 667.5, subd. (c), 1170.12, subds. (b)-(i), 1192.7, subd. (c); *Edwards, supra*, 26 Cal.App.5th 1181; *Arroyo, supra*, 37 Cal.App.5th 727.)

Next, Proposition 57 eliminated Proposition 21’s “direct filing” procedure that had permitted prosecutors in certain cases to bypass fitness hearings for juveniles. (*See* former Welf. & Inst. Code, § 707, subds. (c)-(d) (West Supp. 2016).) As explained in detail in the

¹² Penal Code section 667.5 became effective July 1, 1977. It has been amended several times since, including as recently as last year through Senate Bill 1494.

¹³ However, other areas of law have defined the distinction between violent and nonviolent felonies differently. For instance, the crimes of gross vehicular manslaughter and gross vehicular manslaughter while intoxicated are not violent felonies for purposes of Penal Code section 667.5, subd. (c), but are deemed violent felonies for purposes of Penal Code section 654’s prohibition on double punishment. (Pen. Code, §§ 191.5, 192, subd. (c)(1).) For example, one act of grossly negligent driving causing two deaths (e.g. driver and passenger of one car) can support two charges and two consecutive sentences because such crimes are deemed “violent” for purposes of section 654. (*People v. Calles* (2012) 209 Cal.App.4th 1200, 1216, 147 Cal.Rptr.3d 673.) Accordingly, protracted litigation on this issue would have likely been avoided had Proposition 57 explicitly defined “nonviolent felony.” (Cal. Const., art. I, § 32, subd. (a).)

Court's previous ruling, Proposition 57 also eliminated mandatory adult prosecutions of juveniles for specified crimes, e.g. special circumstances murder-actual killer, and it eliminated the prior presumption of unfitness in certain serious felony cases. (§§ 4.1-4.2, Prop. 57; Welf. & Inst. Code, §§ 602, 707; Pen. Code, § 190.2.)

The point to be made is that while Proposition 57 did possess drafting ambiguities, i.e. how to properly interpret "nonviolent felony," the core goals of the initiative were not hidden. Any reasonable voter at the November 8, 2016, election could be deemed to know that his or her vote in favor of Proposition 57 meant judges not prosecutors would decide which youths would be prosecuted in adult court, and nonviolent felons could likely expect shorter terms of imprisonment.

The lingering question however is whether the Legislature, notwithstanding Proposition 57's explicit language authorizing adult prosecutions of minors 14-17, may amend Welfare & Institutions Code section 707 in the manner set forth in SB 1391. Put another way, may the Legislature, pursuant to section 5 of Proposition 57,¹⁴ amend the initiative to accomplish what its explicit terms did not, namely raise the minimum age for adult prosecution to 16? For reasons previously stated along with those that follow, the Court continues to believe that the answer is no, at least when accomplished by only a simple majority vote of the Legislature.

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¹⁴ Uncodified section 5 of Proposition 57 states:

"This act shall be broadly construed to accomplish its purposes. The provisions of Sections 4.1 and 4.2 of this act may be amended so long as such amendments are consistent with and further the intent of this act by a statute that is passed by a majority vote of the members of each house of the Legislature and signed by the Governor."

As described in the Court's Jan. 7, 2019, statement of decision, Proposition 57's amendment clause does not include the same language found in Proposition 47's amendment clause, the latter permitting *wholesale repeal* by the Legislature of crimes and penalties related to the initiative's core concepts: drug and theft offenses. (See § 15, Prop. 47.) Had similar language been included in Proposition 57's amendment clause, the Court in January of this year would have likely found SB 1391 constitutional.

B. Proposition 57 as the foundation for SB 1391.

1. Proposition 57's "yes" voters could not have reasonably foreseen SB 1391 as a byproduct of their vote, as the same language later found in SB 1391 was deleted from the initiative before its final submission to voters.

- a. *Proposition 57's drafting history.*

As the *Alexander C.* court noted but ultimately dismissed, *language identical to SB 1391* was taken out of Proposition 57 following public comment and prior to its final submission to voters. (*Alexander C.*, *supra*, 34 Cal.App.5th at pp. 1002-1003; *Brown v. Superior Court (CDAA, et al.)* (2016) 63 Cal.4th 335, 203 Cal.Rptr.3d 1, 371 P.3d 223.) Unlike *Alexander C.*, the Court believes the changes made to Proposition 57 before its final submission to be of substantial significance.

Established law at the time of Proposition 57's passing provided that the type of amendment at issue – deleting from the initiative the same language later found in SB 1391 – “[is] most persuasive to the conclusion that the [initiative] should not be construed to include the omitted provision.” (*People v. Soto* (2011) 51 Cal.4th 229, 245, 119 Cal.Rptr.3d 775, 245 P.3d 410.) This is particularly important in the modern era in which proposed initiatives must be submitted for public comment and inspection well before the November election. (See *Brown*, *supra*, 63 Cal.4th 335, interpreting Elec. Code, § 9002.)

Brown v. Superior Court involved amendments made to Proposition 57 following its initial submission to the Attorney General in December of 2015. *Brown* explains how the originally-submitted Proposition 57 would have set the minimum age for adult prosecution at 16. (*Brown*, *supra*, 63 Cal.4th at p. 340.) Following a 30-day window for public comment and substantial discussion with interested parties, e.g. the Governor and California District Attorneys' Association, Proposition 57 was amended to retain 14- and 15-year-old offenders as eligible for adult prosecution in limited circumstances. Also added were the adult parole provisions now codified in article I, section 32, of the California Constitution. (*Id.* at pp. 341-342.)

The Supreme Court in *Brown* held that these pre-election amendments to Proposition 57 did not violate an Elections Code requirement that such amendments be “reasonably germane to the theme, purpose, or subject of the initiative measure as originally proposed.” (Elec. Code, § 9002, subd. (b); *Brown, supra*, 63 Cal.4th at pp. 349-354.) Put another way, the Supreme Court utilized the standard for “single-subject” challenges to ballot initiatives in analyzing and upholding the amendments to Proposition 57. (*Ibid.*; Cal. Const., art. II, § 8, subd. (d).) The question here then is what impact does the deletion of the original provision in Proposition 57 raising the minimum age for adult prosecution to 16 have on the constitutionality of SB 1391. This is a question of statutory interpretation.

b. *Courts have long analyzed additions and deletions to statutes before their final enactment in an effort to properly interpret them.*

In the field of statutory interpretation, analyzing additions and deletions to statutes before their final enactment is not a new concept. Three published cases addressing the issue will be discussed herein. First, in *Rich v. State Bd. of Optometry* (1965) 235 Cal.App.2d 591, 595, 45 Cal.Rptr. 512, several optometrists brought suit based on the denial of their applications to move business locations *and* keep their existing optometry licenses. The State Board of Optometry had interpreted Business & Professions Code section 3077 to mean that all optometry licenses were non-transferable including in circumstances in which a licensee merely sought to relocate. (*Rich, supra*, 235 Cal.App.2d at p. 595.) The *Rich* petitioners thus found themselves risking the loss of their optometry licenses and being forced to reapply for new ones, an apparently lengthy and costly process. (*Id.* at p. 596.)

Both the trial court and the Court of Appeal in *Rich* rejected the State Board’s interpretation of section 3077. (*Id.* at pp. 595-596, 608-612.) The Court of Appeal noted that before the statute was officially amended to the version in effect at the time of the litigation, the Legislature had removed the phrase “removal, or abandonment.” (*Rich, supra*, 235 Cal.App.2d at p. 598-599.) That left only “sale” of an optometry business as a basis for termination. (*Ibid.*) The *Rich* court noted a lengthy legislative history preceding the amendment, one in which several legislators expressed concern that previous versions of the

bill might put a substantial number of optometrists out of business. (*Id.* at pp. 598-600.) For example, the previous version appeared to provide that if an optometrist's rent should go up substantially or if other unforeseen events (e.g. fire, theft, or vandalism) should make it impossible to operate, the optometrist would nevertheless lose his or her license upon relocating. (*Id.* at p. 598-599.) The court therefore deemed the final amendment deleting "removal, or abandonment" from the statute fatal to the Board's argument. (*Id.* at p. 607.)

The *Rich* court went on to hold that:

"The rejection by the Legislature of a specific provision contained in an act *as originally introduced* is most persuasive to the conclusion that the act should not be construed to include the omitted provisions. [citations.] ... Had the words "removal, or abandonment" been ultimately included in the statute, we have no doubt that an optometrist who transferred his branch office from one location to another ... would have been deemed to have "removed" his office ... and would have [then] had to ... obtain a new Branch office license from the Board."

[italics added.] (*Id.* at p. 607.) Quite simply then, because the final version of section 3077 only included "sale" of the business as a triggering event for license termination, the petitioners in *Rich* were allowed to retain their licenses upon relocating. (*Id.* at pp. 608-612.)

In *People v. Brannon* (1973) 32 Cal.App.3d 971, 973-974, 108 Cal.Rptr. 620, a driving under the influence case, the defendant submitted to a breath test, but the administering officer deliberately failed to inform him of his statutory right to either a blood, breath, or urine test. The Court of Appeal held that the breath test evidence was properly admitted at the defendant's trial. (*Brannon, supra*, 32 Cal.App.3d at pp. 976-977.) In so doing, the *Brannon* court rejected the defendant's argument that Vehicle Code section 13353 reflected a legislative intent that failure to comply with its provisions warranted evidentiary exclusion. (*Id.* at pp. 976-977.) The court noted that the statute was silent on evidentiary exclusion *and* language to that effect (exclusion as a remedy) was specifically deleted from the bill before its final enactment by the Legislature. (*Id.* at p. 977.) Regarding the latter point, the *Brannon* court held that:

“In light of this legislative history demonstrating a refusal by the Legislature to make the evidence inadmissible, this court cannot add the same provision. To do so would not be interpreting the legislative intent but would be a gross example of judicial legislation in contravention of the legislative intent *logically implied from the rejection by the Legislature of an identical provision.*”

[italics added.] (*Id.* at p. 977.) Thus as in *Rich*, the *Brannon* court looked to legislative history and in particular changes made to the proposed legislation before its final enactment in interpreting the statute at issue.

Finally, in *People v. Soto*, the day before a bill amending Penal Code section 288, subdivision (b), passed the Legislature, the terms “intimidation,” “coercion,” and “against the will of the victim” as elements of the proposed statute were deleted. (*Soto, supra*, 51 Cal.4th at pp. 240-241.) Against the backdrop of this legislative history, the Supreme Court held that consent was clearly not a defense to aggravated child molestation (section 288, subd. (b)). (*Ibid.*) The majority in *Soto* held that the deletion of the above elements, in particular “against the will of the victim,” evidenced a legislative intent that consent was not a defense to the crime, an intent “that could hardly be more clear.” (*Id.* at p. 240.)

c. *Applying Rich, Brannon, Soto, and Brown to the issues presented herein.*

Before proceeding further, the following argument must be addressed: It is not Proposition 57 that exempts 14- and 15-year-olds from adult prosecution, it is SB 1391 that does so. Put another way, while *Rich*, *Brannon*, and *Soto* together mean that Proposition 57 does not exempt 14- and 15-year-olds from adult prosecution, since language that would have done so was specifically deleted from the initiative’s final version, SB 1391 and not Proposition 57 is at issue. (*Alexander C., supra*, 34 Cal.App.5th at p. 1004.) The *Alexander C.* court found this distinction persuasive. (*Ibid.*)

However, the Supreme Court has held that its “interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature.” (*People v. Acosta* (2002) 29 Cal.4th 105, 112, 124 Cal.Rptr.2d 435, 52 P.3d 624.) As set forth above, courts for years have looked to the manner in which statutes were amended prior

to their enactment in an effort to interpret them, and initiatives are to be treated no differently. (*Ibid.*) Despite this rule of law, the *K.L.* court deemed the changes made to Proposition 57 before its final submission largely irrelevant, as the previous version increasing the minimum age for adult prosecution to 16 was not included in ballot materials provided to voters. (*K.L.*, *supra*, 36 Cal.App.5th at p. 559, fn. 4.)

Alexander C.'s reasoning on this point of law is difficult to decipher. *Alexander C.* acknowledged that:

"Proposition 57's drafting history confirms what is in any event clear from the initiative's text, namely that *Proposition 57 cannot itself be construed to prevent district attorneys from seeking transfer to criminal court of 14- and 15-year-olds accused of serious or violent crimes.*"

[italics added.] (*Alexander C.*, *supra*, 34 Cal.App.5th at p. 1004.) However, the *Alexander C.* court went on to hold that the "intent of Proposition 57, as it can be inferred from examining the initiative as a whole," is not inconsistent with the changes wrought by SB 1391. [italics added.] (*Ibid.*) But if in fact the "initiative's text" specifically allows what SB 1391 now prohibits, and if in fact SB 1391 is merely an amendment to the initiative, how then can the *Alexander C.* court have found that SB 1391 is consistent with the initiative's intent? (*Ibid.*) After all, the truest expression of both legislative and electorate intent is the *text* of the statute ultimately enacted, and the initiative text at issue here explicitly permits what SB 1391 now forbids. (See *In re Cervera* (2001) 24 Cal.4th 1073, 1087, 103 Cal.Rptr.2d 762, 16 P.3d 176, (WERDEGAR, J., concurring), "[A]ctual statutory language ... represents the truest, latest, and most definitive expression of the lawmakers' intent.")

Returning to *K.L.*, the Court respectfully rejects its reasoning in this area as well.¹⁵ After all, the Legislature itself only votes on the final version of a statute and as the

¹⁵ The *K.L.* court curiously utilized the term "specific intent" throughout its opinion and without citation to authority. (*K.L.*, *supra*, 36 Cal.App.5th at pp. 539, 541.) "Specific intent" is nowhere found in the *Amwest* or *Kelly* opinions, nor was it utilized in *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 107 Cal.Rptr.3d 265, 227 P.3d 858, a case about a legislative amendment to Proposition 115 allowing for post-conviction discovery. While *K.L.*'s use of the phrase "specific intent" is largely understandable in context, i.e. what were the specific intents of Proposition 57, the phrase should

preceding cases (*Rich, Brannon, Soto*) illustrate, amendments made before final submission are relevant to statutory interpretation. But even if this were not the case or at least were not the case with initiatives, *Proposition 57 was the subject of an expedited petition to the Supreme Court* resulting in a written ruling almost 5 months before the November 2016 election. (*Brown, supra*, 63 Cal.4th at pp. 340-342.) Thus even if *K.L.* is correct that in interpreting initiative statutes based on extrinsic evidence, we look primarily if not exclusively to ballot materials, the Supreme Court had published a decision about the procedural history of Proposition 57 well before the election cycle that approved it.

Surely the Supreme Court would not say that we are to disregard Supreme Court precedent in interpreting voter-approved initiatives. The Legislature after all is presumed aware of existing law, including decisional law, when it passes new legislation. (*Mosser Companies v. San Francisco Rent Stabilization & Arbitration Bd.* (2015) 233 Cal.App.4th 505, 514, 182 Cal.Rptr.3d 619.) Although perhaps to a lesser degree, voters as well are presumed aware of existing law when they enter the ballot box. (*Valencia, supra*, 3 Cal.5th at p. 369.) Accordingly, the voters of this State must be allowed to rely on Supreme Court precedent in casting their votes. While it is impossible to say just how many voters were aware of the changes made to Proposition 57 before its final submission, ignoring those changes entirely is neither advisable nor desirable given the unique procedural history of the initiative.

The Court would thus hold, if it could, that the procedural history of Proposition 57 is strong evidence that the voters who approved the initiative did not intend for the Legislature to later amend the statute back to the version originally submitted to the Attorney General in 2015. That is in essence what SB 1391 accomplished. Thus, it can be said that SB 1391's changes to Proposition 57 are not unlike the changes held unconstitutional in *Amwest*.

[footnote continued from previous page]

probably be relegated to describing the mens rea for crimes like robbery, burglary, grand theft, first degree murder, and child molestation, crimes with an *element* of specific intent. (Pen. Code, § 20.) After all, the law governing initiatives and their amendment clauses is already confusing enough.

Through SB 1391, the Legislature exempted a limited class of minors from the initiative's command that judges decide their fitness for juvenile court while in *Amwest*, the Legislature exempted a limited class of insurers from the changes (rate roll-backs) implemented by Proposition 103. (*Amwest, supra*, 11 Cal.4th at pp. 1247, 1262-1265.) The Court here fails to see the functional distinction between the statutes at issue in both cases and therefore believes that both are unconstitutional.

2. Proposition 57 reenacted section 707 as amended. Therefore, raising the minimum age for adult prosecution to 16 does in fact amend the initiative as opposed to amending prior legislation unrelated to Proposition 57.

The court in *Alexander C.* declined to decide whether in enacting SB 1391, the Legislature was not amending Proposition 57 but rather an Assembly Bill from 1993 (AB 560) reducing the minimum age for adult prosecution to 14. (*Alexander C., supra*, 34 Cal.App.5th at p. 1003, fn. 1.) For its part, the *K.L.* court summarized the history of California law underlying adult prosecutions of juveniles, and it described how AB 560 preceded Proposition 21 which in turn preceded Proposition 57. (*K.L., supra*, 36 Cal.App.5th at pp. 536-538.) However, *K.L.* also did not address the argument that SB 1391 amended AB 560 not Proposition 57. Nor did either court need do so as their rulings that SB 1391 was a valid exercise of Proposition 57, section 5, were dispositive.

The *T.D.* court addressed the issue in a lengthy footnote:

"Amicus curiae the Attorney General impliedly agrees Senate Bill No. 1391 amended Proposition 57. *T.D.* argues it actually amended Assembly Bill No. 560, which, as we have described, authorized the prosecution of 14- and 15-year-olds in criminal court. *T.D.* says neither Proposition 21 nor Proposition 57 "purported to restrict or eliminate the [L]egislature's ability to continue to determine the age range of minors that may be prosecuted as adults," but instead "merely changed the procedures by which children within a legislatively defined age range can be prosecuted in adult criminal court." [¶]

We agree the longstanding practice of allowing particular 14-and 15-year-olds to be prosecuted in criminal court was continued by Proposition 57. [citations.] Nevertheless, Senate Bill No. 1391 constitutes an amendment to the Act under multiple legal definitions. [citations.]"

[italics added.] (*T.D.*, *supra*, 250 Cal.Rptr.3d at p. 667, fn. 2.) The Court agrees. After all, Proposition 57 not only repealed Welfare & Institutions Code section 707, subdivisions (c)-(d), it also amended subdivision (a) of that same section as follows (strikethrough for deletions, italics for additions):

“In any case in which a minor is alleged to be a person described in subdivision (a) of Section 602 by reason of the violation, when he or she was 16 years of age or older, of any *felony* criminal statute, ~~or ordinance except those listed in subdivision (b)~~, *or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age*, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction....”

(See “<https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf>,” pp. 141-142.) “The amendment of a statute ordinarily has the legal effect of reenacting ... the statute as amended, including its unamended portions.” (*People v. Chenze* (2002) 97 Cal.App.4th 521, 528, 118 Cal.Rptr.2d 362, citing *People v. Scott* (1987) 194 Cal.App.3d 550, 554, 239 Cal.Rptr. 588.) This rule coexists with Government Code section 9605, subdivision (a), which provides that:

“If a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The portions that are not altered are to be considered as having been the law from the time when those provisions were enacted; *the new provisions are to be considered as having been enacted at the time of the amendment*; and the omitted portions are to be considered as having been repealed at the time of the amendment.”

[italics added.] Further, “[w]hen an existing statutory section is amended – even in the tiniest part – the state Constitution requires the entire section to be reenacted as amended.”

(*County of San Diego v. Comm. on State Mandates* (2018) 6 Cal.5th 196, 208, 240 Cal.Rptr.3d 52, 430 P.3d 345, citing Cal. Const., art. IV, § 9; See also *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 990, 9 Cal.Rptr.2d 102, 831 P.2d 327.)

As noted by the court in *T.D.*, there can be little doubt that Proposition 57 amended Welfare & Institutions Code section 707, subdivision (a), by both deleting and adding language of significance. (*T.D.*, *supra*, 250 Cal.Rptr.3d at p. 667, fn. 2.) By virtue of the

state Constitution, those amendments resulted in section 707 being “reenacted as amended.” (*County of San Diego, supra*, 6 Cal.5th at p. 208.) Further, Proposition 57’s changes to section 707(a) are to be treated “as having been enacted at the time of the amendment.” (Gov. Code, § 9605, subd. (a).) Therefore, it was not AB 560 the Legislature amended through SB 1391’s changes to Welfare and Institutions Code section 707, it was Proposition 57.

Any lingering doubt as to this conclusion can be eliminated by the fact that, contrary to ordinary rules of statutory construction, Proposition 57 has been applied retroactively and SB 1391 has received similar treatment. (*Lara, supra*, 4 Cal.5th at pp. 303-304; *Alexander C., supra*, 34 Cal.App.5th at pp. 997-999; *I.R., supra*, 2019 WL 3543618 at p. 5.) What’s more, the Legislature itself apparently believed it was amending Proposition 57 in enacting SB 1391, as its preamble explicitly referenced Proposition 57 and its amendment clause as the source of authority for the statute.¹⁶ (See *Carter v. Calif. Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925, 44 Cal.Rptr.3d 223, 135 P.3d 637, quoting *People v. Canty* (2004) 32 Cal.4th 1266, 1280, 14 Cal.Rptr.3d 1, 90 P.3d 1168, “In considering the purpose of legislation, statements of the intent of the enacting body contained in a preamble, while not conclusive, are entitled to consideration.”) The Court therefore has little difficulty concluding that SB 1391 in fact amended Proposition 57 and not AB 560.¹⁷

¹⁶ The preamble to SB 1391’s statutory text provides:

“Existing law, the Public Safety and Rehabilitation Act of 2016, as enacted by Proposition 57 at the November 8, 2016, statewide general election, allows the district attorney to make a motion to transfer a minor from juvenile court to a court of criminal jurisdiction in a case in which a minor is alleged to have committed a felony when he or she was 16 years of age or older or in a case in which a specified serious offense is alleged to have been committed by a minor when he or she was 14 or 15 years of age. *The existing Public Safety and Rehabilitation Act of 2016 may be amended by a majority vote of the members of each house of the Legislature if the amendments are consistent with and further the intent of the act.*” [italics added.] (See

“https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1391.”)

¹⁷ However, and as discussed in the Court’s January 7 opinion, to the extent SB 1391 can be construed as amending Proposition 21, it did not validly do so having failed to garner a two-thirds majority vote of both houses of the Legislature. (§ 39, Prop. 21.)

3. SB 1391's constitutionality effectively means that Proposition 57, section 5, permits not just amendment but actual repeal of the initiative.

As previously discussed in the Court's ruling of January 7, 2019, recognizing the validity of SB 1391 is to recognize that the Legislature, by simple majority vote, may eliminate adult jurisdiction over minors altogether. This is because nothing in Proposition 57 explicitly differentiates the two age groups (14-15 v. 16-17) other than the differing lists of crimes for which each may be prosecuted. Nothing in the initiative provides that the Legislature may not tinker with the provisions governing 16- and 17-year-olds but is free to do so with respect to 14- and 15-year-olds. In addition, just as exempting 14- and 15-year-olds from adult prosecution reduces incarceration costs and overall prison populations, eliminating adult prosecutions of minors altogether would further those goals to an even greater degree. (*Alexander C.*, *supra*, 34 Cal.App.5th at p. 1002.)

But assuming such legislation – eliminating altogether adult prosecutions of juveniles – is constitutional, wouldn't Proposition 57's amendment clause thereby swallow the initiative? Wouldn't such legislation be more in the nature of a repeal rather than an amendment, as doing away with adult prosecutions of juveniles has the direct effect of doing away with judges determining fitness, the latter being an explicit intent and purpose of Proposition 57. (§ 2, Prop. 57.) Further, and as discussed in the Court's January 7 opinion, *the Legislature itself* apparently believes SB 1391 is at least a partial "repeal," as it used that word in the SB 1391 preamble to describe its elimination of a prosecutor's ability to seek transfers of 14- and 15-year-olds.¹⁸ And if in fact a repeal, either partial or complete, is what is truly at issue, it must be reemphasized that Proposition 47's amendment clause permits repeal while Proposition 57's does not. (*See* fn. 14, *supra*.)

The argument that SB 1391 repeals a judge's ability to determine a minor's fitness for juvenile court was one of the primary arguments advanced by the dissenting justice in *T.D.* Justice Poochigian, the *T.D.* dissenter, noted that section 2 of Proposition 57 contains five

¹⁸ See "https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1391."

enumerated purposes, none of which appear to have any greater weight or significance than the other. (*T.D., supra*, 250 Cal.Rptr.3d at pp. 674-675.) Justice Poochigian noted that SB 1391 appears to both ignore and conflict with the fifth stated purpose that judges be “*require[d]* ... to decide whether juveniles should be tried in adult court.” [italics in original.] (*Id.* at p. 675.)

Focusing on the language of section 2, “purpose and intent” number 5, Justice Poochigian explained:

“The enumerated intent to “require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court,” has two clear components. First, the phrasing “Require a judge ... to decide whether juveniles should be tried in adult court” means exactly what it says. The intent of Proposition 57 is to “require” a particular person (i.e., a judge) to make a particular decision (i.e., whether a juvenile should be tried as an adult). Second, the phrase, “not a prosecutor” embodies an intent to deny prosecutors the power to ultimately decide whether juveniles should be tried in adult court. [¶]

Senate Bill 1391 clearly conflicts [with] this enumerated intent. Under Senate Bill 1391, neither a prosecutor nor a judge may decide whether 14- and 15-year-old juveniles may be tried in adult court. Instead, the *Legislature* has made the decision for 14- and 15-year-old juveniles. This is plainly in conflict with Proposition 57’s stated purpose of *requiring* a judge to decide whether juveniles should be tried in adult court.”

[italics in original.] (*Id.* at pp. 674-675, quoting § 2, Prop. 57.) The Court agrees.

Proposition 57 was for the most part focused on altering *who decides* if a minor is eligible for adult prosecution, not which minors were eligible. Proposition 57’s “yes” voters clearly selected judges to be the ones to decide, not the Legislature. (*Ibid.*) By usurping that role with respect to minors 14-15, the Legislature violated article II, section 10, subdivision (c) of our state Constitution.

Addressing the minor’s argument that SB 1391 further enhances Proposition 57’s goal of “enlarg[ing] the number of minors who could potentially remain in the juvenile justice system,” Justice Poochigian noted that this “overly-simplistic approach ignores the

fact that Proposition 57's purposes are multi-faceted." (*Id.* at p. 675.) The justice acknowledged that while "Proposition 57 may have intended to reduce the number of youths to be prosecuted as adults, [it may do so] only up to a point. Proposition 57, like any enactment, was written to "go so far and no further." [citations.]" [quotations in original.] (*Ibid.*) The dissenting justice thus rejected the minor's invitation to "cherry-pick a single goal and conclude [that] any enactment advancing that singular goal ... must further the multi-faceted purposes of Proposition 57, regardless of how contrary that enactment may be to [the] other purposes." (*Ibid.*)

Concluding, the dissent noted:

"[T]here can be no doubt that Proposition 57 did intend to preserve the prior practice of permitting some 14 and 15 year olds to be tried as adults. Proposition 57 made *affirmative* statutory tweaks to ensure that, notwithstanding the closely related changes it made to juvenile law, 14 and 15 year olds could still be transferred to criminal court and prosecuted as adults. [citations.] Thus, Proposition 57 was not oblivious to its effect of preserving the prior practice, but rather went out of its way to ensure those juveniles could still be prosecuted as adults in some circumstances. Senate Bill 1391 is in direct conflict with that intent."

[italics in original.] (*Id.* at p. 676.) Once again, the Court fully agrees.

To conclude this section, it must be remembered that Proposition 57 was implemented solely because California voters, in the exercise of our State's direct democracy, approved it. (Cal. Const., art. II, § 8, subd. (a).) As discussed in the Court's January 7 opinion, the Attorney General in 2016 prepared ballot materials for Proposition 57 made available to the public in advance of the election. In pertinent part those ballot materials read:

"In addition, [Proposition 57] specifies that prosecutors can only seek transfer hearings for youths accused of (1) committing certain significant crimes listed in state law (such as murder, robbery, and certain sex offenses) *when they were age 14 or 15* or (2) committing a felony when they were 16 or 17. As a result of these provisions, there would be fewer youths tried in adult court."

[italics added.]¹⁹ The Supreme Court has said that “adopting [a] construction ... as to the scope of a phrase in [an initiative] without notice to the voters, [that was] not mentioned by the Attorney General or Legislative Analyst, and [that is] contrary to the stated purposes and assurances described in the measure’s own preamble, would not protect the voters’ right to directly enact laws but could very likely encourage the subversion and manipulation of that democratic right.” (*Valencia, supra*, 3 Cal.5th at p. 374.) In sum, left to its own devices the Court would hold that a legislative amendment like SB 1391, one that to a substantial degree eliminates the need, the very foundation if you will for the initiative it purports to amend, violates the California Constitution. (Cal. Const., art. II, § 10, subd. (c).) To hold otherwise is to abdicate the judicial duty to “jealously guard” the people’s power of initiative. (*Kelly, supra*, 47 Cal.4th at pp. 1025-1026, quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776, 38 Cal.Rptr.2d 699, 889 P.2d 1019.) Further, “[f]or a court to construe an initiative statute to have substantial unintended consequences strengthens neither the initiative power nor the democratic process”²⁰ (*Valencia, supra*, 3 Cal.5th at p. 386, quoting *Ross v. RagingWire Telecommunications* (2008) 42 Cal.4th 920, 930, 70 Cal.Rptr.3d 382, 174 P.3d 200.) Because SB 1391 amends Proposition 57 to create not just an unintended consequence, but a consequence intentionally omitted from the initiative, it is unconstitutional. (*Ibid.*)

4. Limitations on imputing to voters a lawyer-like knowledge of the law also render SB 1391 unconstitutional.

The thorny issue of imputing legal knowledge to initiative voters, e.g. an understanding of the broad interpretation now given to Proposition 57’s amendment clause, is not a new one for courts. In *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 905, 135

¹⁹ (See “<https://www.courts.ca.gov/documents/BTB24-5H-1.pdf?1511913600040>,” page 4 of 14, labeled “page 56” at bottom left.)

²⁰ The Court does not mean to imply that “that the drafters of Proposition [57] pulled a fast one on an uninformed public.” (*Valencia, supra*, 3 Cal.5th at p. 405 (Liu, J., dissenting).) Nor does the Court mean to imply that the Legislature had anything but benign motives in passing SB 1391. Rather, the dispute described herein is simply about *the manner* in which the changes implemented by SB 1391 have come about.

Cal.Rptr.2d 30, 69 P.3d 951, the California Supreme Court addressed a provision of Proposition 21 that elevated all misdemeanors, both "wobblers" (alternate misdemeanor/felony crimes) and non-wobblers, to felonies if committed for the benefit of, at the direction of, or in association with a criminal street gang. (Pen. Code, §§ 17, subd. (b), 186.22, subd. (d).) In addressing the question whether the electorate could properly be charged with knowledge of the criminal law term "wobbler," the *Robert L.* court noted that to resolve questions of purpose and ambiguity, "[courts must] look to ... materials that were [put] before the voters." (*Robert L.*, *supra*, 30 Cal.4th at p. 905; *Valencia*, *supra*, 3 Cal.5th at p. 364.)

Importantly, the court refused to attribute to "the average voter ... unschooled in the patois of criminal law," an arcane understanding of legal terminology. (*Robert L.*, *supra*, 30 Cal.4th at p. 902; *Edwards*, *supra*, 26 Cal.App.5th at p. 1191; *Valencia*, *supra*, 3 Cal.5th at pp. 372-373.) The *Robert L.* court thus declined to assume that the average voter was familiar with the concept of "wobblers," and therefore rejected the argument that Proposition 21's alternate penalty provision (Pen. Code, § 186.22, subd. (d)) elevating *all* misdemeanors to felonies excluded by implication non-wobbler misdemeanors. (*Robert L.*, *supra*, 30 Cal.4th at p. 909.)

In *People v. Valencia*, *supra*, 3 Cal.5th at pp. 350-351, the Supreme Court was called upon to decide whether language in Proposition 47 defining "an unreasonable risk of danger to public safety" was intended not just to govern that initiative but also an initiative passed two years before, Proposition 36.²¹ Proposition 47's definition of "unreasonable risk of danger to public safety" was narrower than Proposition 36's definition of the same phrase, effectively meaning that more persons would qualify for relief if Proposition 47's language governed both. (*Id.* at pp. 350-353.) Key to the petitioners' argument in *Valencia* was the

²¹ Proposition 36 changed the "Three Strikes Law" to require that a "third strike" must also be a serious or violent felony, aka a "strike." (Pen. Code, §§ 667.5, subd. (e), 1192.7, (e).) Similar to Proposition 47, Proposition 36 created a resentencing statute for those serving "third strike" sentences who would not have received the same sentence had Proposition 36 been in effect at the time of their commitment offenses. (See Pen. Code, §§ 1170.18, 1170.126.)

fact that Proposition 47 appeared to reference the entire Penal Code as governed by its definition of “unreasonable risk of danger to public safety,” a definition requiring proof that a re-sentencing petitioner remains likely to commit a so-called “super strike.” (*Id.* at pp. 355-356; *See* Pen. Code, §§ 1170.18, subd. (c), 667, subd. (e)(2)(C)(iv).)

A badly fractured court in a 4-3 decision held that Proposition 47 did not alter Proposition 36’s definition of an “unreasonable risk of danger to public safety.” (*Id.* at pp. 357-377.) Justice Kruger wrote a concurring opinion in *Valencia* that is perhaps the law of the case as her grounds for decision were likely the most narrow.²² (*See People v. Barba* (2013) 215 Cal.App.4th 712, 733, 155 Cal.Rptr.3d 707.) In it, Justice Kruger emphasized:

“Our cases recognize that, as a practical matter, voters often rely on the experts employed by the Attorney General and the Legislative Analyst to summarize proposed initiatives and to discuss their significant effects. Here, the use of the phrase “[a]s used throughout this code” in section 1170.18(c) [defining “unreasonable risk to public safety”] was, it appears, sufficiently oblique that *neither the Attorney General nor the Legislative Analyst appeared to recognize the possibility that its purpose might be to make a significant amendment to the resentencing provisions of Proposition 36.* [¶]

When these trained experts were apparently unaware of the initiative’s possible effect on Proposition 36, and thus did not alert the voters to the possibility of such an effect, it becomes more difficult to conclude that the voters understood that a “yes” vote would have that consequence.”

[italics and boldface added.] (*Id.* at p. 384.) The same may be said for Proposition 57’s amendment clause. Just as the voters who approved Proposition 47 were not (according to *Valencia*) properly alerted to its potential for altering another initiative, voters who approved Proposition 57 should not be expected to have foreseen subsequent amendatory legislation gutting important provisions in the initiative.

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²² Two other justices signed the concurring opinion.

Writing for the court in *Valencia*, Chief Justice Cantil-Sakauye emphasized:

“Consequently, without an express reference to ... the Three Strikes Reform Act, the average voter would not have known the impact or import of the phrase “[a]s used throughout this Code” in section 1170.18, subdivision (c), *unless the voter had exhaustively sifted through the voluminous Penal Code* in order to find the single other reference to the phrase “unreasonable risk of danger to public safety.” We similarly recognized in *Taxpayers* that it is unreasonable to presume that the voters had such a “degree of thoroughness” that they “attentively studied” the measure and analyzed various provisions using *the acumen of a legal professional*. [citations.]”

[quotations in original, italics added.] (*Id.* at p. 371, citing *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm.* (1990) 51 Cal.3d 744, 770, 274 Cal.Rptr. 787, 799 P.2d 1200.) Thus, as it did in *Robert L.*, the court in *Valencia* refused to impute sophisticated lawyer-like knowledge to those voters who approved Proposition 47. The court therefore held that Proposition 36’s definition of “unreasonable risk of danger to public safety” remained its own. (*Valencia*, *supra*, 3 Cal.5th at p. 375.)

As set forth in detail in the Court’s original statement of decision as well as herein, both the Attorney General and Legislative Analyst apparently did not see SB 1391 coming, just like they did not anticipate application of Proposition 47 to Proposition 36. As is hopefully now amply established, no reasonable voter could have reasonably concluded that section 5 of Proposition 57 means what a slim majority of our Legislature apparently believes it to mean. After all, the proper interpretation of an initiative amendment clause is every bit as complicated if not more complicated than the question of what a “wobbler” is and how it operates. Thus, like the petitioners in *Valencia*, the remedy for those in favor of the policies embodied in SB 1391 is to return to the initiative ballot box, or as mentioned *supra*, seek a supermajority vote of the Legislature.

For the sake of further discussion, assume that SB 1391 had been drafted to eliminate adult jurisdiction over juveniles ages 14-16. This hypothetical legislation would eliminate, by age at least, 75 percent of minors previously eligible for adult prosecution. In that event would the result in *Alexander C.*, *K.L.*, and *T.D.* have been the same? As previously stated,

under Proposition 57 the only statutory distinction between juveniles 14-15 and juveniles 16-17 are *the crimes* for which they are eligible for adult prosecution, not their eligibility per se. Would the Courts of Appeal perhaps hold that this hypothetical legislation is constitutional as to 14- and 15-year-olds but not with respect to 16-year-olds? While this is perhaps an issue for another day, it cannot be denied that SB 1391, *Alexander C.*, *K.L.*, and *T.D.* all beg the question.

5. An analysis of the facts in *Alexander C.*, *K.L.*, *T.D.*, *I.R.*, as well as those before the Court perhaps offers a window into the mind of the average November 2016 voter who deliberated thoroughly over his or her vote in favor of Proposition 57.

In the Court's view, regarding questions of statutory interpretation arising from initiatives and their amendment clauses, the underlying facts of a criminal case are often of little importance. For example, while the Court devoted 21 pages to its first statement of decision, very little was said therein about the particulars of the underlying cases. The decisions in *Alexander C.*, *K.L.*, *T.D.*, and *I.R.* are no different, the three appellate courts for the most part merely reciting the minors' redacted names and charged offenses and without further detailed references to the alleged victims, their injuries, or their deaths. However, upon further reflection the Court now sees some relevance to the facts in the above-named cases as well as those before the Court and will therefore briefly describe them.

In *Alexander C.*, a jury found the defendant guilty of 15 felonies including attempted murder, torture, and sex crimes, and all were committed when the defendant was 14-years-old. (*Alexander C.*, *supra*, 34 Cal.App.5th at p 998.) *K.L.* involved a 15-year-old charged with murder, attempted murder, and shooting into an occupied motor vehicle, all with firearm use and criminal street gang allegations. (*K.L.*, *supra*, 36 Cal.App.5th at pp. 532-534.) An additional real party in interest in *K.L.* was another 15-year-old charged with murder that was alleged to have been committed by personally and intentionally discharging a firearm. (*Id.* at p. 558.)

In *T.D.*, a jury convicted a minor who at age 14 committed first-degree murder with a firearm in the course of an attempted carjacking. (*T.D.*, *supra*, 250 Cal.Rptr.3d at p. 663.) In *I.R.*, a 15-year-old was charged with a special circumstance gang-related stabbing murder along with the crime of active participation in a criminal street gang. (*I.R.*, *supra*, 2019 WL 3543618 at p. 1.) The minor in *I.R.* was later charged with committing a separate and unrelated felony assault that was alleged to be gang-related, and that was alleged to have occurred after his 16th birthday. (*Id.* at p. 2.)

In underlying case no. INF1500253, defendants Hall, Torres, and one other (an adult) have been found guilty by a jury of six robberies, five of which were perpetrated in a home invasion robbery involving three or more accomplices, all of which involved firearm use, all of which involved criminal street gang activity. Finally, in underlying case no. INF1500502, defendant Torres has pled guilty to carjacking, robbery, and active participation in a criminal street gang (two counts), all with use of a firearm, all with criminal street gang allegations.

As emphasized in the Court's January 7, 2019, statement of decision, the question posed herein is *not* whether SB 1391 is wise legislation. That is almost never a question for courts and is certainly not the issue now. (See *Cadiz v. Agricultural Labor Relations Bd.* (1979) 92 Cal.App.3d 365, 372, 155 Cal.Rptr. 213, quoting *Estate of Horman* (1971) 5 Cal.3d 62, 77, 95 Cal.Rptr. 433, 485 P.2d 785, "Courts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature.") However, when one considers the facts of these six cases, what comes to mind is the inescapable likelihood that tens if not hundreds of thousands of Californians cast their votes in favor of Proposition 57 in understandable reliance on the stated premise that 14- and 15-year-olds would still be eligible for adult prosecution in a limited class of cases and *only upon order of a judge.* (§ 2, Prop. 57.) After all, as even *Alexander C.* concedes, Proposition 57 did not eliminate the ability of prosecutors to seek adult prosecution of juveniles 14-17, it merely stripped prosecutors of their ability to file against juveniles in adult court without a fitness hearing. (*Alexander C.*, *supra*, 34 Cal.App.5th at p. 1004.)

The six cases described above unfortunately remind us that minors under 16 can and sometimes do present an incredible risk to public safety.²³ In view of the important competing interests at stake: public safety, juvenile rehabilitation, reduced incarceration costs, etc., the average voter in November 2016 could have reasonably concluded that Proposition 57 as written struck a proper balance between the executive and judicial branches in juvenile justice cases. The average voter could have reasonably concluded that Proposition 57 preserved the limited ability of prosecutors to seek adult consequences for minors under 16 who commit adult-like offenses in an adult-like manner. The Court firmly believes a great many voters in 2016 fell into this description and their voices deserve protection from the courts, including this one. For reasons set forth in its previous order as well as this one, the Court respectfully concludes that in enacting SB 1391, the Legislature unconstitutionally pulled the rug out from the voters described above.

C. Potential impact of SB 1391's constitutionality.

Before concluding this order, the Court believes it is important to consider the potential impact of SB 1391's constitutionality upon other initiatives including future ones. The potentially broad-ranging impact of SB 1391's constitutionality is perhaps best expressed through a hypothetical based upon an existing initiative statute.

1978's Proposition 13 implemented extraordinary limits upon the imposition of property taxes in California. It amended the state Constitution to provide that:

"The maximum amount of any ad valorem tax on real property *shall not exceed One [sic] percent (1%)* of the full cash value of such property.

The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties."

[italics added.] (Cal. Const., art. XIII A, § 1, subd. (a).) Proposition 13 also severely limited the availability of *subsequent* increases in property taxes as follows:

²³ SB 1391 now means that juveniles 16 and older can conceivably be prosecuted in adult court for felony joyriding (Veh. Code, § 10851), while those under 16 may not be prosecuted in adult court for rape, robbery, kidnapping, and murder. While there is no constitutional requirement that legislation make sense, it is not improper for courts to comment when absurd outcomes result from routine application of legislative statutes.

“The full cash value base may reflect from year to year the inflationary rate *not to exceed 2 percent* for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction, or may be reduced to reflect substantial damage, destruction, or other factors causing a decline in value.”

[italics added.] (*Id.* at § 2, subd. (b).) Proposition 13 has resulted in many California homeowners continuing to enjoy property tax rates set over 40 years ago, while their brand-new next-door neighbors’ rates are assessed on a 2019 purchase price. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 249-250, 149 Cal.Rptr. 239, 583 P.2d 1281 (BIRD, C.J., concurring and dissenting).) Not surprisingly then, many critics of Proposition 13 are every bit as strident as its supporters.²⁴ Nevertheless, Proposition 13 is now older than a good many Californians and like it or not, Proposition 13 remains a critical restraint on government’s ability to increase property taxes in the Golden State.

Assume that California voters in a close race approved an initiative authorizing a modest increase in property taxes beyond the strict terms of Proposition 13, but with an amendment clause similar to that contained in Proposition 57. Given this State’s long resistance to increased property taxes, would any “yes” voter in this hypothetical reasonably believe they were silently providing the Legislature the authority to carve certain properties out from Proposition 13’s protections, e.g. all homes built after 1990? Or, if voters were to pass an initiative taking *commercial* properties out of Proposition 13’s strict protections and with an amendment clause similar to Proposition 57, section 5, would anyone reasonably believe their “yes” vote silently provided the Legislature the power to increase *residential* property taxes?

Nevertheless, in either scenario set forth above, the legislative amendments at issue would arguably further the initiatives’ purposes by increasing property tax revenue as well as the concomitant governmental ability to spend for the general welfare of the State’s

²⁴ A simple “<https://google.com>” search for “proposition 13” results in 172 million postings.

residents. Based on their reasoning as applied to SB 1391, wouldn't the *Alexander C., K.L.*, and *T.D.* courts all have to uphold such legislation? Wouldn't they also have to uphold the legislation even if the specific changes to be enacted had been specifically deleted from the hypothetical initiatives, *as was the case with Proposition 57*? To reach those conclusions however requires the leap of faith that Proposition 57 voters, like the hypothetical voters described above, were aware not just of the explicit statutory terms they were approving, but also the ramifications of the broad (in hindsight at least) amendatory authority they were bestowing upon the Legislature. The Court here is simply unable to make that jump.

Only time will tell what the ramifications of SB 1391's constitutionality will mean for future initiatives. The Court ventures to guess that today's SB 1391 victory may one day spell tomorrow's defeat.

IV. Conclusion.

The Court's ruling recognizes the patent unfairness not to recall sentence and transfer this case to juvenile justice court when others similarly situated to defendants, the overwhelming majority in fact, have been permitted to litigate their post-conviction claims from the confines of juvenile court. While the Court strongly disagrees with the decisions in *Alexander C., K.L.*, and *T.D.*, it is nevertheless preferable to preserve the status quo (SB 1391 enjoying full force and effect) than to subject the defendants to two or more years of state prison confinement while their appeals are pending.

Therefore, the defendants shall be transferred forthwith to the juvenile justice court. Pending future hearings in juvenile justice court, defendants shall be housed in county jail without bail.

IT IS SO ORDERED.

DATED

SEPT. 9,
2019

Russell Moore

Hon. Russell Moore, Judge
Superior Court of California
County of Riverside
Desert Branch, Department 1A

